

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

IN RE PERSONAL RESTRAINT PETITION OF:

DANIEL RAYMOND LONGAN,

PETITIONER.

**SUPPLEMENTAL BRIEF IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

Jeffrey E. Ellis #17139
Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com

Attorney for Mr. Longan

A. INTRODUCTION

This supplemental brief, requested by the Court, addresses the application of four recent Washington Supreme Court decisions: *In re PRP of Morris*, __ Wn.2d __, 288 P.3d 1140, 2012 WL 5870496 (2012); *State v. Wise*, __ Wn.2d __, 288 P.3d 1113, 2012 WL 5870496 (2012); *State v. Paumier*, __ Wn.2d __, 288 P.3d 1126, 2012 WL 5870479 (2012); and *State v. Sublett*, __ Wn.2d __, __ P.3d __, 2012 WL 5870484 (2012).

On direct appeal and with a limited record, this court affirmed Longan's conviction concluding that the separate questioning of a juror took place in a public hallway. In other words, that portion of voir dire may not have occurred in court, but it did not occur in private. In his PRP, Longan established through sworn statements that the hallway was a secure area that the public could not access. Although the State has stated it "contests" that the hallway is a private area, it failed to present any evidence that the hallway was a public thoroughfare.

At a minimum, Longan is entitled to an evidentiary hearing. However, because the State has not properly contested the fact that the hallway was off-limits to the public with any evidence, this Court should accept that fact and grant this petition. Voir dire is presumptively open. The closure of any part of voir dire must be preceded by a complete *Bone-Club* hearing. Failure to do so is a structural error which requires reversal.

B. SUMMARY OF RELEVANT FACTS

It is uncontested that the judge and the lawyers spoke to a potential juror in a hallway about the juror's ability to serve due to an unspecified medical condition. 7 RP 107-111. It is also uncontested that no hearing preceded the decision to question the jury in the hallway.

The hallway was not open to the public. Mr. Longan attached declarations to his PRP attesting that the hallway where questioning took place was a "secure" part of the courthouse—that the public did not have access to the hallway. The State did not present any competing declarations.

C. ARGUMENT

The Post Conviction Pleading Standard

In Washington, a PRP is required to contain a description of the evidence upon which the petitioner's claim of unlawful restraint is premised and the evidence proffered to support those allegations. RAP 16.7(a). An evidentiary hearing will be ordered if the pleadings raise a *prima facie* claim of constitutional error which cannot be resolved on the existing record. RAP 16.11(b); *In re PRP of Williams*, 111 Wash.2d 353, 365, 759 P.2d 436 (1988). Washington courts have three options regarding constitutional issues raised in a personal restraint petition:

1. If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed;
2. If a petitioner makes at least a *prima facie* showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for an evidentiary hearing;
3. If a petitioner makes a *prima facie* claim of error and the facts are not disputed, the court should grant the PRP without remanding the cause for further hearing.

RAP 16.11(a); RAP 16.12; *In re PRP of Rice*, 118 Wash.2d 876, 828 P.2d 1086 (1992); *In re PRP of Hews*, 99 Wash.2d 80, 88, 660 P.2d 263 (1983).

The Washington Supreme Court has compared review of the factual support for a PRP to ruling on a motion for summary judgment. *State v. Harris*, 114 Wash.2d 419, 435-436, 789 P.2d 60 (1990) (describing review of evidence submitted in support of incompetency to be executed claim and comparing that review to a PRP). In other words, the appellate court is required to order an evidentiary hearing if competent evidence is submitted which raises a triable issue. In determining whether the plaintiff has set forth a *prima facie* case, the court must treat the allegations as true. *Lewis v. Bours*, 119 Wash.2d 667, 670, 835 P.2d 221 (1992) (describing appellate review of an order granting summary judgment).

The same pleading standard applies to the State when it contests any of Petitioner's facts. "In order to define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence."

Rice, 118 wn.2d at 886. Only when “the parties’ materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.” *Id.*

Here, Longan met his burden. The State did not.

The Relitigation Bar Does Not Apply

Despite the fact that Longan has now supplied this Court with a material fact that it did not have on direct review, the State nevertheless argues that this Court is precluded from reviewing the closed courtroom claim. Caselaw upends the State’s argument.

“(E)ven if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground.” *In re Taylor*, 105 Wash.2d 683, 717 P.2d 755 (1986). The ends of justice merit re-examination of an issue where it is supported by new evidence. *In re Personal Restraint of Benn*, 134 Wash.2d 868, 886, 884 85, 952 P.2d 116 (1998).

Longan has done what the law requires in order to revisit an issue. Longan has provided this Court with a previously missing, material fact. The State’s attempt to invoke the relitigation bar would clearly frustrate the ends of justice given that this Court’s earlier decision was based on a misapprehension of the facts.

Failure to Conduct a Bone-Club Hearing Prior to a Closure is a Structural Error.

A trial court is required to *resist* closure. *State v. Bone–Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995). In this case, the judge *sua sponte* announced the closure of the courtroom. A trial court is also required to consider alternatives to closure even when they are not offered by the parties. *Paumier*, slip opinion at ¶ 8. See also *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010).

A complete pre-closure is required when closure is contemplated. No pre-closure hearing took place in this case. Failure to conduct a *Bone–Club* hearing is a structural error mandating reversal. *Paumier* held:

The trial court's failure to conduct a *Bone–Club* analysis was structural error that warrants reversal on appeal, with or without a contemporaneous objection. To be clear, our holding does not preclude a trial judge from closing a courtroom for individual questioning. Rather, our holding merely requires a trial court to conduct a *Bone–Club* analysis first. Because that analysis was not conducted here, *Paumier* is entitled to a new trial.

Id. at ¶ 14. *Wise* added: “The error that *Wise* alleges, however—the closure of voir dire for the individual questioning of a number of prospective jurors in chambers without considering the *Bone–Club* factors—is structural error.” *Wise*, at ¶ 21.

In contrast, the trial court conducted a pre-closure hearing in *State v. Momah*, 167 Wash.2d 140, 152, 217 P.3d 321 (2009). *Wise* made it clear

that *Momah* presented a unique set of facts—which are readily distinguished from this case. “We emphasize that it is unlikely that we will ever again see a case like *Momah* where there is effective, but not express, compliance with *Bone–Club*.” *Id.* at ¶ 20.

Wise continued:

Momah was distinguishable from other public trial violation cases on two principal bases: (1) more than failing to object, the defense affirmatively assented to the closure of voir dire and actively participated in designing the trial closure and (2) though it was not explicit, the trial court in *Momah* effectively considered the *Bone–Club* factors. At bottom, *Momah* presented a unique confluence of facts: although the court erred in failing to comply with *Bone–Club*, the record made clear—without the need for a post hoc rationalization—that the defendant and public were aware of the rights at stake and that the court weighed those rights, with input from the defense, when considering the closure.

Wise, at ¶ 20.

In this case, the trial court did not conduct any portion of the required *Bone-Club* hearing. The trial court did not resist closure. Instead, the trial court invited closure. The trial judge could simply have asked if the juror was willing to answer certain questions in open court. If the juror had requested privacy, then the trial judge could have conducted a hearing to determine whether closure was warranted. But, the trial judge did none of that.

The Trial Court Sua Sponte Closed the Courtroom

In *Paumier*, *Wise* and *Morris*, the Washington Supreme Court reaffirmed that a defendant does not waive his right to a public trial by

failing to object to a closure at trial. *Wise, supra* at ¶ 22 (“Wise did not object when the trial court moved part of the voir dire proceedings into chambers.”); *Paumier, supra* at ¶ 3 (“The prosecution, defense counsel, and Paumier were all present for the questioning and offered no objections.”); *Morris, supra* at ¶ 17 (finding that Morris waived his right to be present, but only after and perhaps because trial court declared intention to close courtroom).

In addition, the Washington Supreme Court considered and rejected this same argument in *State v. Strode*, 167 Wash.2d 222, 229, 217 P.3d 310 (2009) (“The State also asserts that Strode invited or waived his right to challenge the closure when he acquiesced, without any objection, to the private questioning of jurors. However, the public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal.”). *Strode* added that the “right to a public trial is set forth in the same provision as the right to a trial by jury, and it is difficult to discern any reason for affording it less protection than we afford the right to a jury trial. It seems reasonable, therefore, that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner.” *Id.* at 229 n. 3.

There is no argument that can be made in this case that Longan waived his right to an open and public trial.

Caselaw Does Not Recognize a Subject Matter Exemption to the Public Trial Right for Certain Parts of Voir Dire

The State argues that because the private questioning concerned whether the juror had a hardship that could result in excusal for cause that somehow the questioning fell outside of the constitutional protection. Caselaw does not make such a distinction. In fact, in each of the trio of recently decided cases the State argued that the nature of the questioned asked justified a closure of the courtroom. The singular response from the Washington Supreme Court was: only if a hearing is conducted first can a trial court close the courtroom for a portion of voir dire.

Both the Washington Supreme Court and this Court have both held that voir dire questions regarding the ability to serve are part of trial. See *State v. Irby*, 170 Wash.2d 874, 246 P.3d 796 (2011); *State v. Slert*, 169 Wash.App. 766, 774, 282 P.3d 101 (2012) (“Because the record indicates that this in-chambers conference involved the dismissal of four jurors for case-specific reasons based at least in part on the jury questionnaires, we hold that the in-chambers conference and the dismissal of the jurors were part of the jury selection process to which the public trial right applied.”). If a hearing is conducted, certain sensitive issues can certainly be discussed privately—but not without a hearing first.

Reversal is Required

The State will almost certainly argue that the evaluation of prejudice from a courtroom closure in a PRP remains unresolved. It is certainly true that *Morris* was decided on narrow grounds and the Supreme Court did “not address whether a public trial violation is also presumed prejudicial on collateral review because we resolve Morris's claim on ineffective assistance of appellate counsel grounds instead.” However, both *Paumier* and *Wise* explained how to evaluate the harm that flows from a structural error in any case.

In a PRP, a petitioner must show “actual and substantial” prejudice. *In re Pers. Restraint of Woods*, 154 Wash.2d 400, 409, 114 P.3d 607 (2005). In a direct appeal involving an “unpreserved error,” the defendant must show a manifest or “actual” error affecting a constitutional right. In the case of a structural error, the necessary prejudice is always presumed.

In *Paumier*, the court held that a prejudice is always presumed with a structural error:

The next concerns we must address are whether Paumier had to contemporaneously object to the individual questioning to preserve the error and if he must show prejudice on appeal. Ordinarily, a party must contemporaneously object to preserve an error. RAP 2.5. However, RAP 2.5(a) allows an unobjected to error to be raised on appeal if it is a “manifest error affecting a constitutional right.” This court has previously interpreted “manifest error” as requiring a defendant to show actual prejudice. *State v. O'Hara*, 167 Wash.2d 91, 99, 217 P.3d 756 (2009). Here, that would mean Paumier must show actual prejudice because he failed to object to the closure during trial. But RAP 2.5(a) does not apply in its typical manner

here because the improper courtroom closure was structural error. As noted in *Wise*, “[n]othing in our rules or our precedent precludes different treatment of structural error as a special category of ‘manifest error affecting a constitutional right.’ ” *Wise*, — Wash.2d at — n. 11, — P.3d — (quoting RAP 2.5(a)(3)).

In fact, there is good reason to treat structural errors, like violation of a defendant's public trial right, differently. A structural error “affect[s] the framework within which the trial proceeds” and renders a criminal trial an improper “ ‘vehicle for determin[ing] guilt or innocence.’ ” *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (quoting *Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). The right to a public trial is a unique right that is important to both the defendant and the public. *Wise*, — Wash.2d at —, — P.3d —; *Momah*, 167 Wash.2d at 148, 217 P.3d 321. Moreover, assessing the effects of a violation of the public trial right is often difficult. *Wise*, — Wash.2d at —, — P.3d — (quoting *United States v. Marcus*, — U.S. —, 130 S.Ct. 2159, 2165, 176 L.Ed.2d 1012 (2010)). Requiring a showing of prejudice would effectively create a wrong without a remedy. Therefore, we do not require a defendant to prove prejudice when his right to a public trial has been violated.

Paumier, at ¶ 12-13. *Wise* added:

Structural error is a special category of constitutional error that “affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Fulminante*, 499 U.S. at 310, 111 S.Ct. 1246. Where there is structural error “ ‘a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.’ ” *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 577–78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (citation omitted)). Structural error, including deprivation of the public trial right, is not subject to harmlessness analysis. *Id.* at 309–10; *Easterling*, 157 Wash.2d at 181, 137 P.3d 825. A defendant “should not be required to prove specific prejudice in order to obtain relief.” *Waller*, 467 U.S. at 49, 104 S.Ct. 2210. Accordingly, unless the trial court considers the *Bone–Club* factors on the record before closing a trial to the public, the wrongful deprivation of the public trial right is a structural error presumed to be prejudicial. *Easterling*, 157 Wash.2d at 181, 137 P.3d 825; *Orange*, 152 Wash.2d at 814, 100 P.3d 291; *Bone–Club*, 128 Wash.2d at 261–62, 906 P.2d 325.

Wise, at ¶ 19.

The *Wise* Court added:

Because it is impossible to show whether the structural error of deprivation of the public trial right is prejudicial, we will not require *Wise* to show prejudice in his case. “We will not ask defendants to do what the Supreme Court has said is impossible.” *Owens v. United States*, 483 F.3d 48, 65 (1st Cir.2007).

Id. at ¶ 29.

This is consistent with the holdings of the United States Supreme Court. In addition to the right to a public trial, the list of structural errors includes: the right to counsel; to counsel of choice; the right of self-representation; the right to an impartial judge; and the right to accurate reasonable-doubt jury instructions. *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963) (reversing a felony conviction of a defendant who lacked counsel without analyzing the prejudice that the deprivation caused); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (deeming deprivation of counsel of choice a structural error); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (finding harmless error analysis inapplicable to deprivation of the right to self-representation because exercising the right increases the chance of a guilty verdict); *Tumey v. Ohio*, 273 U.S. 510, 534 (1927) (holding that trial before a biased judge “necessarily involves a lack of due process”); *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (finding that, because of an inadequate reasonable-doubt instruction, no actual jury

verdict had been rendered and the court could thus not apply harmless error analysis to determine whether the error affected the verdict). Aside from *Gonzalez-Lopez* and *Tumey*, all of the above cited cases were collateral attacks.

Structural errors “are so intrinsically harmful as to require automatic reversal (*i.e.*, ‘affect substantial rights’) without regard to their effect on the outcome.” See *Neder v. United States*, 527 U.S. 1, 7 (1999). As the *Neder* Court expressed: “Those cases, we have explained, contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. Such errors infect the entire trial process, and ‘necessarily render a trial fundamentally unfair. Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence...and no criminal punishment may be regarded as fundamentally fair.’ ” *Neder*, 527 U.S. at 8-9. Because structural errors, such as a failure to hold a public trial, “defy harmless-error review” and “infect the entire trial process,” (*Neder*, 527 U.S. at 8), reviewing courts must “eschew[] the harmless-error test entirely.” *Arizona v. Fulminante*, 499 U.S. at 312.

Unlike trial rights, structural rights are “‘basic protection[s]’ whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function.” *Sullivan v. Louisiana*, 508 U.S. at 281. Structural errors have “consequences that are necessarily unquantifiable and indeterminate.”

Id.; *United States v. González-Huerta*, 403 F.3d 727, 734 (10th Cir.2005) (“[I]f, as a categorical matter, a court is capable of finding that the error caused prejudice upon reviewing the record, then that class of errors is not structural.”).

If it is impossible to determine whether a structural error is prejudicial, *Sullivan*, 508 U.S. at 281, it necessarily follows that any defendant who claims structural error never needs to make out a case of identifiable prejudice. *See Sustache-Rivera v. United States*, 221 F.3d 8, 17 (1st Cir.2000) (“If [an error] did constitute structural error, there would be *per se* prejudice, and harmless error analysis, in whatever form, would not apply.”); *McGurk v. Stenberg*, 163 F.3d 470, 475 (8th Cir.1998) (holding that where counsel's deficient performance resulted in structural error, prejudice will be presumed). Otherwise, a post-conviction court requiring specific proof of prejudice would be asking post conviction petitioners to do what the courts have said is impossible.

Even in collateral review cases, structural errors are always considered “prejudicial” and accordingly are reversible *per se*. *See Hertz, Randy and Liebman, James, Federal Habeas Corpus Practice and Procedure*, 5th Ed. (2001), p. 1519.

The presumption of prejudice does not disappear in a PRP. Likewise, there is no justification to require the “impossible” in a PRP, but not in a direct appeal. Therefore, reversal is required whether the error is

raised as an “unpreserved” manifest error on direct appeal or in a PRP.

This Court can also reach the same result by applying the rule from *State v. Sandoval*, 171 Wash.2d 163, 168-9, 249 P.3d 1015 (2011). In *Sandoval*, the Supreme Court held that the actual and substantial prejudice standard does not apply when the petitioner has not had a prior opportunity to properly “appeal the issue to a disinterested judge.”

In that case, Sandoval had to bring a PRP to meet his burden of proving ineffective assistance of counsel because his counsel's advice did not appear in the trial court record. Because of this procedural obstacle to Sandoval's ineffective assistance claim, he had not “already had an opportunity to appeal to a disinterested judge.” Thus, Sandoval did not have to show actual and substantial prejudice; his burden was only to show that he is entitled to relief for one of the reasons listed in RAP 16.4(c).

A similar procedural factual obstacle existed in this case: the trial court record did not indicate that the hallway was closed and there was no reason for this court to conclude otherwise. As a result, Longan’s first opportunity to fully and accurately litigate this issue was in a PRP. As a result, he does not need to show “actual” prejudice. Instead, the presumption of prejudice that arises from any structural error mandates reversal.

C. CONCLUSION

Based on the above, this Court should either: (1) reverse and remand for a new trial; or (2) for an evidentiary hearing.

DATED this 28th day of December, 2012.

Respectfully Submitted:

/s/Jeffrey Erwin Ellis
Jeffrey Erwin Ellis #17139
Attorney for Mr. Longan
Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
206/218-7076 (ph)

CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that on December 28, 2012, I served a copy of this supplemental brief on opposing counsel by sending it attached to an email directed to the Cowlitz County Prosecutor's Office and DPA Michelle L. Shaffer.

December 28, 2012//Portland, OR
Date and Place

/s/Jeffrey E. Ellis
Jeffrey Ellis